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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 United States of America, ) CV 16-8051-PCT-PGR (MHB)  
10 Plaintiff/Respondent, ) CR 12-8088-PCT-PGR  
11 v. ) **REPORT AND RECOMMENDATION**  
12 Shawn Lorin Henderson, )  
13 Defendant/Movant. )  
14

15 TO THE HONORABLE PAUL G. ROSENBLATT, UNITED STATES DISTRICT JUDGE:

16 Defendant/Movant Shawn Lorin Henderson, who is confined in the Federal  
17 Correctional Institution-Victorville I in Adelanto, California, has filed a pro se Motion Under  
18 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.  
19 (CV 16-8051 (“CV”) Doc. 1 and CR 12-8088 (“CR”) Doc. 118.) Plaintiff United States of  
20 America (the “government”) filed a Response, but Movant has not filed a Reply despite the  
21 Court having granted two extensions of time to do so. (CV Docs. 4, 7, 10.)

22 **BACKGROUND<sup>1</sup>**

23 On April 3-4, 2012, Defendant and Rowdy Lee Simcox, Sr., (“Simcox”) drove a rental  
24 car containing two loaded handguns, ammunition, a ski mask, zip ties, a bullet proof vest,  
25 and pry bars. Law enforcement in Texas stopped their vehicle and found a loaded Glock .9  
26 mm-caliber handgun, with an obliterated serial number, from a shaving kit located directly  
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28 <sup>1</sup> The following facts are derived from the government’s response, exhibits and  
attachments submitted thereto, Movant’s pleadings, as well as, the other documents set forth  
in this matter’s civil and criminal record.

1 beneath Defendant's feet in the vehicle's passenger compartment. Police also recovered a  
2 backpack containing a 17-round Glock magazine and .9 mm-caliber ammunition from the  
3 back seat of the car in a backpack of the defendant. Police found another handgun, also with  
4 its serial number obliterated, in the trunk of the car in Simcox's suitcase. (CR Doc. 87 at 1-2.)

5 Police officers traced both handguns to a January 5, 2012 burglary at Perfect Pawn  
6 and Jewelry in Arizona, from which a total of 44 firearms were stolen. After his arrest, while  
7 awaiting an interview, Defendant told a sheriff's deputy that the two handguns had been  
8 located in a van located outside a house that ATF had raided in Arizona while investigating  
9 the Perfect Pawn theft. Defendant added that he and Simcox were going to pick up \$5 million  
10 in drug money when they were stopped in Texas. (CR Doc. 87 at 1-2.)

11 On April 18, 2012, a grand jury returned a three-count indictment charging Simcox  
12 and Defendant with Felon in Possession of Firearms and Ammunition (18 U.S.C. §§  
13 922(g)(1) and 924(a)(2)), Possession of a Firearm with an Obliterated Serial Number (18  
14 U.S.C. §§ 922(k) and 924(a)(1)(B)), and Possession of a Stolen Firearm (18 U.S.C. §§ 922(j)  
15 and 924(a)(2)). (CR Doc. 1.)

16 On January 22, 2013, co-defendant Simcox pleaded guilty to Count One of an  
17 Information (Theft from a Federal Firearm Licensee) and Count Three of the Indictment  
18 (Possession of a Stolen Firearm). (CR Doc. 51; CR Doc. 110, RT 1/22/13 7.) In his plea  
19 agreement, Simcox admitted that on January 5, 2012, he "and another person" had  
20 burglarized a Federal Firearm Licensee in San Tan Valley, Arizona, and "stole 44 firearms,"  
21 including a "Glock nine millimeter handgun" that "had been shipped in interstate  
22 commerce." (CR Doc. 52 at 5; CR Doc. 110, RT 1/22/13 22-23.) Simcox further admitted  
23 that on April 4, 2012, he was in Show Low, Arizona, and "traveling with another individual  
24 in a car." (*Id.*) "[I]n the trunk of the car [he] possessed" that same stolen Glock .9 mm-caliber  
25 handgun. (*Id.*)

26 Simcox's plea was public, and a copy of his plea agreement was entered onto the  
27 publicly-available docket on January 22, 2013. (CR Docs. 51, 52.) The factual basis of  
28 Simcox's plea is contained in the plea agreement. (CR Doc. 52.) Defendant's trial counsel

1 was notified of the entry of the plea, and a copy of the plea agreement was provided to all  
2 parties on January 22, 2013. (CR Docs. 51, 52.) According to the record, Simcox's change  
3 of plea proceeding occurred from 10:36 a.m. to 11:01 a.m. (CR Doc. 51; CV Doc. 4.)  
4 Defendant and his counsel were present in the same courtroom before the same judge that  
5 same morning for a pretrial conference. (CR Doc. 54; CV Doc. 4.) At the pretrial conference,  
6 which began at 11:22 a.m., Defendant's counsel discussed Simcox's change of plea and used  
7 the fact of the Simcox guilty plea as a basis to re-urge Defendant's motion to continue the  
8 trial. (CR Doc. 54; CR Doc. 120, RT 1/22/13 2-4.)

9 A final pretrial conference was held on February 12, 2013, and the Court discussed  
10 Simcox's guilty plea before Defendant and his counsel. (CR Doc. 58; CV Doc. 100, RT  
11 2/12/13 2.) Moreover, Defendant's counsel indicated her awareness of Simcox's plea  
12 agreement when she discussed the facts of the case and potential defenses:

13 As I've indicated, Mr. Henderson very much believes that the evidence is  
14 lacking to put the firearm in his possession. This was not his vehicle. He was  
15 the passenger in the vehicle. The firearms were clearly stolen by the driver,  
16 who has admitted responsibility for stealing those firearms and possessing  
17 them. They were not found on Mr. Henderson's person, they were found in  
18 closed containers within the other individual's vehicle.

19 (CV Doc. 100, RT 2/12/13 9.)

20 Jury trial began on February 20, 2013. (CR Doc. 63.) In opening statements, defense  
21 counsel put forth the defense theory that the firearms belonged to Simcox, that Defendant  
22 was merely was along for the ride, and that the government could not prove that Defendant  
23 knew that there were firearms in the car:

24 This wasn't Mr. Henderson's car. Mr. Henderson wasn't driving the car. And  
25 he wasn't the one that stole the firearms. Mr. Simcox was actually the one  
26 responsible for all of that. Mr. Simcox in this case had the car rented by his  
27 mother so he can drive it. Mr. Simcox was the one who was actually driving  
28 the car when it was stopped in Texas. And Mr. Simcox through the ATF  
investigation turned out to be the one who stole the firearms that were found  
in the vehicle.

I'm going to guess that several if not all of you have had an opportunity to  
have a ride in a friend's car before. I don't know how many of you actually  
take the time to ask what in this car before you get inside of it. Whether you  
ask for an inventory of the car, whether you do your own search of the car,  
going through suitcases and zippered bags and things like that.

1 (CR Doc. 101, RT 2/20/13 92.)

2 During trial, the government called the state trooper who made the initial stop and  
3 arrest of Simcox and Defendant in Texas. (CR Doc. 101, RT 2/20/13 99-176.) During the  
4 trooper's testimony, the government introduced and played a video of the road-side search  
5 of the car in which Simcox and Defendant were traveling. (CR Doc. 101, RT 2/20/13  
6 107-118.) Simcox was driving and Defendant was sitting in the front passenger seat. (CR  
7 Doc. 101, RT 2/20/13 108.) The video showed the trooper removing the Glock firearm from  
8 the right-front passenger side of the vehicle, determining that the Glock was loaded, and  
9 placing the firearm on the top front of the car. (CR Doc. 101, RT 2/20/13 115-118.) The  
10 trooper also testified about a backpack that was in the rear seat of the car. (CR Doc. 101, RT  
11 2/20/13 125-33.) The backpack contained a loaded clip for the Glock, along with loose .9  
12 mm-caliber ammunition, a can of chewing tobacco and syringes (which matched chewing  
13 tobacco and a syringe found in the front passenger seat), an iPod, and clothes and shoes that  
14 were consistent with Defendant's size, and not Simcox's. (CR Doc. 101, RT 2/20/13 123-24,  
15 125-33.) In the trunk of the car, the trooper found body armor, a duffle bag with clothes for  
16 a larger man, a tool box with pry bars, zip ties, and a Springfield Armory .9 mm-caliber  
17 handgun with ammunition. (CR Doc. 101, RT 2/20/13 133-37, 138-48.)

18 Defense counsel's cross examination of the trooper focused on the fact that Simcox  
19 was the driver, (CR Doc. 101, RT 2/20/13 150), that Defendant was "just along for the ride,"  
20 (CR Doc. 101, RT 2/20/13 154), that the passenger floorboard was littered with sundry items  
21 while the driver's side floorboard was clean, (CR Doc. 101, RT 2/20/13 159), and that the  
22 Glock handgun was concealed in a zipped up shaving kit that was under the front passenger  
23 seat so as to not be visible, (CR Doc. 101, RT 2/20/13 160-61).

24 A deputy sheriff from Texas testified that while Defendant was in custody in Texas,  
25 Defendant saw an ATF agent from Arizona and commented that he recognized the agent  
26 because he was nearby when ATF agents raided the house to search for the stolen firearms.  
27 (CR Doc. 101, RT 2/20/13 178-80.) The deputy sheriff also testified that Defendant told him  
28 that Defendant and Simcox went to Texas to pick up \$5 million in drug money. (CR Doc.

1 101, RT 2/20/13 180.) During cross examination of the deputy, defense counsel emphasized  
2 that Simcox and Defendant had communicated while in custody and that Defendant's  
3 statements could have come from information provided to Defendant by Simcox. (CR Doc.  
4 101, RT 2/20/13 182-84.)

5 An ATF agent testified that an iPod was found in the backpack and that video  
6 recovered from that iPod appeared to be taken by Defendant and clearly contained recordings  
7 of Defendant's voice. (CR Doc. 102, RT 2/21/13 215-16.) The government introduced video  
8 of Defendant and Simcox at a Walmart in Arizona which showed Defendant and Simcox  
9 purchasing zip ties, gloves, and duct tape and Defendant paying for those items. (CR Doc.  
10 102, RT 2/21/13 221-24.) Zip ties and gloves were found in a toolbox in the trunk of the car  
11 when it was searched in Texas. (CR Doc. 101, RT 2/20/13 136-137.) A three-foot prybar was  
12 also found loose in the trunk. (CR Doc. 101, RT 2/20/13 137.) Body armor matching  
13 Defendant's size was found in the trunk. (CR Doc. 101, RT 2/20/13 133-134.)

14 The agent also testified about the investigation of the theft of the firearms, that the two  
15 firearms recovered from the car in Texas had been stolen in Arizona, and that Defendant's  
16 statements to the deputy in Texas were consistent with the ATF raid on a house in Arizona  
17 during the investigation of the stolen firearms. (CR Doc. 102, RT 2/21/13 205, 227-228.) The  
18 agent also testified about how the firearms had defaced serial numbers but that law  
19 enforcement was able to restore the serial numbers in a laboratory. (CR Doc. 102, RT  
20 2/21/13 200-201.)

21 During cross examination of the ATF agent, defense counsel elicited admissions that  
22 the agent had investigated the theft of the firearms for some period of time, that the agent had  
23 no knowledge of Defendant's presence when the house in Arizona was searched, and that his  
24 investigation led the agent "to the conclusion" that Simcox was "responsible for that theft."  
25 (CR Doc. 102, RT 2/21/13 230-31.) Defense counsel also got the agent to admit that he did  
26 not know whether the stolen guns had remained in Arizona between the theft on January 5,  
27 2012, and the arrest of Defendant and Simcox on April 4, 2012. (CR Doc. 102, RT 2/21/13  
28 231.)

1 At the close of evidence, defense counsel moved for a directed verdict. Notably, she  
2 argued that the government had not met its burden regarding venue, i.e., to show that  
3 Defendant had actually possessed either firearm while in Arizona. (CR Doc. 102, RT 2/21/13  
4 256-58.) When the court denied the motion for directed verdict, defense counsel successfully  
5 requested an instruction regarding venue so that she could re-urge her arguments to the jury.  
6 (CR Doc. 102, RT 2/21/13 261.)

7 According to the record, defense counsel addressed two primary issues during closing  
8 arguments. First, she alleged that the fact that a gun was found underneath the passenger seat  
9 did not prove that Defendant possessed the firearm because there was testimony that  
10 Simcox's possessions were found on the passenger-side floorboard. (CR Doc. 102, RT  
11 2/21/13 290-91.) Second, she argued that the government had not proved venue because there  
12 was no evidence that the firearms were present in Arizona. (CR Doc. 102, RT 2/21/13  
13 297-98.) As to both points, defense counsel argued that the evidence was insufficient to show  
14 that Defendant was aware of the presence of the firearms or ammunition and, therefore,  
15 should not be found guilty of knowingly possessing them. (CR Doc. 102, RT 2/21/13 298.)

16 The jury returned a verdict of guilty on Count One (Unlawful Possession of a Firearm  
17 or Ammunition) and a verdict of not guilty on Count Two (Transportation or Shipment of a  
18 Firearm with an Obliterated or Altered Serial Number). (CR Doc. 66, 72.) The jury could not  
19 reach a verdict on Count Three. (CR Doc. 66, 72.) Specifically as to Count 1, the jurors were  
20 instructed as to unanimity, (CR Doc. 102, RT 2/21/13 326), and the jury found Defendant  
21 guilty of possessing (i) "a Glock 9 mm handgun"; (ii) "one or more rounds of Tula  
22 ammunition"; and (iii) "one or more rounds of Federal 9 mm ammunition." (CR Doc. 72.)  
23 The jurors did not find Defendant guilty of possessing the Springfield Armory .9 mm-caliber  
24 handgun or the Carbon .9 mm-caliber ammunition. (Id.)

25 On April 9, 2013, approximately six weeks after Defendant's trial, Simcox was  
26 sentenced to 120 months in prison. (CR Doc. 79.) On June 25, 2013, Defendant was  
27 sentenced to 110 months in prison. (CR Doc. 89.)  
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1 Defendant raised two issues on appeal:

2 Issue One – Did the prosecutor present inconsistent theories as to whether it  
3 was Henderson or his co-defendant, Simcox, who possessed a Glock handgun  
4 and ammunition within the District of Arizona? If so, did this inconsistency  
5 amount to misconduct resulting in a violation of due process that denied  
6 Henderson a right to a fair trial? If a due process violation occurred, was this  
7 plain error? If so, Henderson’s conviction and sentence should be vacated.

8 (CV Doc. 4, Appellant’s Opening Brief at 7.)

9 Issue Two – Did the district court err in denying Henderson’s Motion to  
10 Dismiss Counsel in violation of his right to effective assistance of counsel and  
11 of his right to due process and a fair hearing? If so, his sentence should be  
12 vacated, the case remanded and new counsel appointed to represent him.

13 (Id. at 28.)

14 As to Issue One, Defendant argued that the prosecutor acted improperly in presenting  
15 inconsistent evidence as a result of a supposed conflict between the theory presented at trial  
16 (that Defendant possessed the Glock underneath the front passenger seat in Texas) and the  
17 factual basis of Simcox’s plea agreement (that Simcox possessed the Glock in the trunk of  
18 the car while in Show Low, Arizona, several hours before). (Id. at 40-41). Defendant further  
19 argued that this conflict was particularly important in light of the venue issues presented in  
20 the case. (Id. at 46-48.)

21 The Ninth Circuit considered and rejected Defendant’s arguments. See United States  
22 v. Henderson, 597 F.App’x. 412 (9<sup>th</sup> Cir. March 12, 2015) (unpublished). As to the alleged  
23 inconsistency between the Simcox plea agreement and the government’s case at trial, the  
24 Ninth Circuit specifically found that there was no material inconsistency:

25 The government did not act in bad faith or use false evidence when it argued  
26 that Henderson possessed the same handgun that his co-defendant admitted to  
27 possessing in the factual basis of his plea agreement; and, these were not  
28 fundamentally inconsistent theories.

Id.

29 In his § 2255 Motion, Movant alleges that “Counsel failed to investigate, interview,  
30 and call witness [whose] testimony was exculpatory in evidence, and [whose] testimony  
31 would have contradicted arresting officers testimony, not only constituted negligence, more  
32 over ineffective assistance of counsel.” Movant alleges that if defense counsel had conducted



1 diligent “pre-trial investigation,” then “she would have been aware of the co-defendant  
2 Simcox’s plea agreement” in which the co-defendant “places the Glock Model 26 also in the  
3 trunk not at [Movant’s] feet.” Movant further alleges that if defense counsel had called  
4 co-defendant Simcox as a defense witness, this “without a doubt would have changed the  
5 outcome of the trial, and proved [Movant] did not knowingly possess the Glock Model 26  
6 ... .” Movant concludes that this failure “cannot be called” strategic and, therefore, is  
7 “ineffective assistance of counsel that deprived [Movant] of his due process rights to a fair  
8 trial.”

### 9 DISCUSSION

10 In its Response, the government argues that Movant’s ineffective assistance of counsel  
11 claim is meritless. Thus, the government contends that Movant’s Motion to Vacate, Set  
12 Aside, or Correct Sentence be denied and dismissed with prejudice.

13 The two-prong test for establishing ineffective assistance of counsel was set forth by  
14 the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on an  
15 ineffective assistance claim, a convicted defendant must show (1) that counsel’s  
16 representation fell below an objective standard of reasonableness, and (2) that there is a  
17 reasonable probability that, but for counsel’s unprofessional errors, the result of the  
18 proceeding would have been different. See id. at 687-88.

19 There is a strong presumption that counsel’s conduct falls within the wide range of  
20 reasonable assistance. See id. at 689-90. “A fair assessment of attorney performance requires  
21 that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the  
22 circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s  
23 perspective at the time.” Id. at 689. Review of counsel’s performance is extremely limited.  
24 Acts or omissions that “might be considered sound trial strategy” do not constitute ineffective  
25 assistance of counsel. Id.

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1       The prejudice component “focuses on the question whether counsel’s deficient  
2 performance renders the result of the trial unreliable or the proceeding fundamentally unfair.”  
3 Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). In the context of an uncalled witness, a  
4 petitioner must identify the witness, see United States v. Murray, 751 F.2d 1528, 1535 (9<sup>th</sup>  
5 Cir. 1985), show that the particular witness was willing to testify, see United States v.  
6 Harden, 846 F.2d 1229, 1231-32 (9<sup>th</sup> Cir. 1988), what the witness’s testimony would have  
7 been, see United States v. Berry, 814 F.2d 1406, 1409 (9<sup>th</sup> Cir. 1987), and that the testimony  
8 would have been sufficient to create a reasonable doubt as to guilt, see Tinsley v. Borg, 895  
9 F.2d 520, 532 (9<sup>th</sup> Cir. 1990). See also Dows v. Wood, 211 F.3d 480, 486-87 (9<sup>th</sup> Cir. 2000)  
10 (finding the defendant did not establish IAC where there was no evidence, other than  
11 “[Defendant’s] self-serving affidavit,” that alibi witness “would have provided helpful  
12 testimony for the defense”).

13       The court need not address both Strickland requirements if the petitioner makes an  
14 insufficient showing on one. See Strickland, 466 U.S. at 697 (explaining that “[i]f it is easier  
15 to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that  
16 course should be followed.”); Rios v. Rocha, 299 F.3d 796, 805 (9<sup>th</sup> Cir. 2002) (stating that  
17 “[f]ailure to satisfy either prong of the Strickland test obviates the need to consider the  
18 other”).

19       The Court finds that Movant has neither alleged nor provided any evidence to  
20 demonstrate that Simcox would have testified, and that such testimony would have been  
21 favorable. See Harden, 846 F.2d at 1231-32; Tinsley, 895 F.2d at 532. In Harden, the  
22 defendant was convicted at trial of felon-in-possession of a firearm and claimed that his trial  
23 counsel was ineffective for failing to call a co-defendant (Washington) who had claimed  
24 ownership of the firearm and had pled guilty prior to Harden’s trial. See Harden, 846 F.2d  
25 at 1231-32. The Ninth Circuit rejected the claim for two reasons. First, Washington “pled  
26 guilty and was awaiting sentencing at the time of Harden’s trial. There is no evidence in the  
27 record which establishes that Washington would testify in Harden’s trial.” Id. Second, the  
28 decision not to call the co-defendant “appear[ed] to be a reasonable trial tactic” in light of the

1 co-defendant's criminal history and the fact that there were two guns involved in that case  
2 and it was "counterintuitive to suggest that [the co-defendant] not only possessed the gun  
3 under the car, but also the revolver in the car for which Harden had matching bullets." Id. at  
4 1232.

5 Like Harden, Movant has not alleged or offered any evidence that Simcox was willing  
6 to testify. Similarly, Movant has not offered any allegation or evidence that Simcox would  
7 have provided testimony that was favorable to the defense. Rather, video evidence showed  
8 a search of the car in which Simcox and Movant were traveling. Simcox was driving and  
9 Movant was sitting in the front passenger seat. The video showed the trooper removing the  
10 loaded Glock from the right-front passenger side of the vehicle. The state trooper also  
11 testified about a backpack that was in the rear seat of the car containing a loaded clip for the  
12 Glock, along with loose .9 mm-caliber ammunition, a can of chewing tobacco and syringes  
13 (which matched chewing tobacco and a syringe found in the front passenger seat), an iPod,  
14 and clothes and shoes that were consistent with Movant's size. Further, Simcox could have  
15 testified faithfully to his plea agreement and stated that he had provided the firearm to  
16 Movant days before the journey while they were in Arizona. He could have testified that  
17 Movant knew of both firearms and that they had purchased the zip ties and gloves while in  
18 Arizona in order to commit a drug robbery. Such testimony would have been consistent with  
19 the evidence in the trial.

20 Moreover, during trial, defense counsel attempted to distance any prior association  
21 with Simcox and establish that the gun had been placed under the seat without Movant's  
22 knowledge, and that there was no evidence that Movant had been involved with Simcox in  
23 the prior theft of the firearms. She further argued that the government had not established  
24 venue. However, Simcox's complete statement in his plea agreement (that he "and another  
25 person" had committed burglary, stolen a Glock and other firearms in Arizona, and that he  
26 was traveling in Show Low "with another individual in the car" when he possessed the Glock  
27 in the trunk), would have potentially undermined the theory of the defense by establishing  
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1 a relationship or association between Simcox and Movant, and that they likely acted in  
2 concert, in the minds of the jurors.

3 Thus, the Court finds that Movant has failed to demonstrate ineffective assistance of  
4 counsel. Movant is not entitled to any relief.

### 5 CONCLUSION

6 Having determined that Movant's claim is meritless, the Court will recommend that  
7 Movant's Motion to Vacate, Set Aside, or Correct Sentence be denied and dismissed with  
8 prejudice.

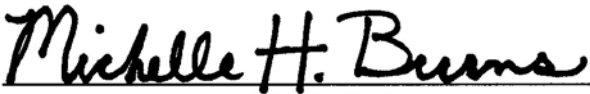
9 **IT IS THEREFORE RECOMMENDED** that Movant's Motion Under 28 U.S.C.  
10 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (CV Doc.  
11 1 and CR Doc. 118) be **DENIED and DISMISSED WITH PREJUDICE**;

12 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
13 to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a  
14 substantial showing of the denial of a constitutional right.

15 This recommendation is not an order that is immediately appealable to the Ninth  
16 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
17 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
18 parties shall have fourteen days from the date of service of a copy of this recommendation  
19 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
20 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
21 days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of  
22 Civil Procedure for the United States District Court for the District of Arizona, objections  
23 to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure  
24 timely to file objections to the Magistrate Judge's Report and Recommendation may result  
25 in the acceptance of the Report and Recommendation by the district court without further  
26 review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure  
27 timely to file objections to any factual determinations of the Magistrate Judge will be  
28 considered a waiver of a party's right to appellate review of the findings of fact in an order

1 or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72,  
2 Federal Rules of Civil Procedure.

3 DATED this 14th day of December, 2016.

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6 Michelle H. Burns  
7 United States Magistrate Judge  
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